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# Great Subtleties of Judgment: The Fourth Circuit's Approach to the Public Employee Speech Doctrine in Jackson v. Bair

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# "Great Subtleties of Judgment": The Fourth Circuit's Approach to the Public Employee Speech Doctrine In *Jackson v. Bair*

[Editor's note: The United States Fourth Circuit Court of Appeals, sitting en banc, recently reheard the *Jackson v. Bair* decision discussed in this Note. The court was equally divided and thus affirmed the judgment of the district court that the initial court of appeals decision reversed. *Jackson v. Bair*, 1988 U.S. App. LEXIS 18082 (4th Cir. 1988) (en banc) (equally divided court). The superceded decision, therefore, has no force of law, but due to the equal division of the members of the Fourth Circuit the issue remains very much alive.]

There are an estimated 16.7 million public employees in the United States.[1] Many of these employees hold strong opinions and some express those opinions aloud. For many years the Supreme Court held that public employment could be conditioned by terms of employment which restricted speech.[2] As Justice Holmes put the matter, "[A police officer] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[3] In other words, he might be fired for what he says.

Over the last forty years, however, the Court has shaped its public employee speech doctrine position in light of numerous violations of public employees' constitutional rights.[4] By 1968, the Court held that public employees could no longer be "subjected to any conditions, regardless of how unreasonable."[5] Finally, Justice Holmes' proverbial police officer could speak his mind and keep his job—depending, that is, on what he said and under what circumstances he said it.

The law in this area—sometimes called the public employee speech doctrine—has long recognized the uneasy, yet necessary, trade-off between the free and lively exchange of ideas and the efficient and proper functioning of our public institutions.[6] In striking this delicate constitutional balance, courts some-

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1. In 1985 there were approximately 9,685,000 local government employees, 3,984,000 in state government and 3,021,000 in federal government for a total of approximately 16,690,000 government employees. STATISTICAL ABSTRACT OF THE UNITED STATES 282 (108th ed. 1988).

2. *See, e.g.*, Adler v. Board of Educ., 342 U.S. 485, 493 (1952) (members of "subversive" groups who were, under a New York statute, ineligible for employment in public schools, were not as a result of the statute "denied the right of free speech and assembly").

3. McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220, 29 N.E. 517, 517-18 (1892) (nothing in the constitution prevents the city from creating by ordinance a condition to employment in which the servant "agree[s] to suspend his constitutional rights of free speech as well as of idleness by the implied terms of his contract").

4. *See, e.g.*, Shelton v. Tucker, 364 U.S. 479, 490 (1960) (an Arkansas statute requiring teachers in public schools and colleges to file annually an affidavit listing each organization to which the instructor has belonged or contributed within the preceding five years is unconstitutional as an "unlimited and indiscriminate sweep" that extends "far beyond what might be justified in the exercise of the State's legitimate inquiry into the fitness and competency of its teachers"); Wieman v. Updegraff, 344 U.S. 183, 191 (1952) (Oklahoma statute requiring state employees to take a "loyalty oath" offends due process, because it "stifle[s] the flow of democratic expression and controversy at one of its chief sources" and is "an assertion of arbitrary power").

5. Keyishian v. Board of Regents, 385 U.S. 589, 605-06 (1967) (quoting Keyishian v. Board of Regents, 345 F.2d 236, 239 (2d Cir. 1965)).

6. *See, e.g.*, Pickering v. Board of Educ., 391 U.S. 563, 568 (1968) (when teacher who criti-

times face situations in which public employers disciplined employees primarily because of the disruption the employees' speech threatens to cause, rather than any actual disruption.[7] Such cases pose peculiarly troublesome problems.

In *Jackson v. Bair*[8] the United States Court of Appeals for the Fourth Circuit reversed the trial court's grant of summary judgment for the defendant, a prison warden, who fired a guard allegedly in violation of the the guard's first amendment rights.[9] The court held that the warden, acting on the basis of conflicting reports about the potential effect of plaintiff prison guard's critical speech, lacked an "objectively verifiable basis" for anticipating a potential threat to efficiency and discipline.[10]

This Note surveys significant United States Supreme Court and Fourth Circuit cases that consider the public employee speech doctrine. The Note focuses on the *Jackson* court's treatment of the facts of the case and how that decision compares to the public employee speech cases decided by the Supreme Court and the Fourth Circuit. The Note concludes that *Jackson* reduces the discretionary power of public employers in borderline cases where employee speech has the potential to disrupt operations and increases the burden borne by employers seeking to justify their employment decisions. If an employer is confronted with conflicting or ambiguous reports of employee speech that may threaten discipline or loyalty, the employer had better exercise the same "great subtleties of judgment"[11] that judges exercise, or her disciplinary decision will likely be overruled.

Plaintiff Russell Jackson worked as a state corrections officer at Mecklenburg Correctional Center (MCC), a maximum security institution located in Virginia.[12] Jackson was commander of the Prison Emergency Response Team (PERT) which was "designed to respond to inmate disturbances."[13] In 1984, MCC experienced a number of such disturbances, including the escape of several death row inmates, an inmate riot in July, an August uprising that evolved into a hostage-taking incident, and the more routine occurrence of "frequent assaults."[14] Toni Bair, assumed the position of warden following this turbulent

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cizes school board's tax proposals is terminated, the problem "is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees"). For a discussion of *Pickering*, see *infra* notes 70-80 and accompanying text.

7. *See, e.g.*, Connick v. Myers, 461 U.S. 138, 152 (1983) ("[W]e do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action."). For a discussion of *Connick*, see *infra* notes 81-101 and accompanying text.

8. 851 F.2d 714 (4th Cir.), *withdrawn en banc*, 1988 U.S. App. LEXIS 18082 (4th Cir. 1988) (equally divided court). Judge Haynesworth joined the opinion of the court, which was delivered by Judge Phillips. Judge Widener filed a dissenting opinion.

9. *Id.* at 720.

10. *Id.* at 722.

11. *Id.* at 717 ("The balancing element in particular requires great subleties [sic] of judgment in weighing the conflicting values and interests at stake.").

12. *Id.* at 715.

13. *Id.*

14. *Id.* at 723 (Widener, J., dissenting).

summer.[15] During Bair's first three weeks, Jackson criticized Bair's handling of a confrontation between Jackson and an inmate.[16]

On February 6, 1985, Jackson joined other employees at a table in the staff dining room.[17] A visiting Department of Corrections employee, Martha Williams, was present at the table.[18] The subject of Warden Bair's policies arose during discussion and Jackson "expressed his displeasure with what he thought were Bair's lenient policies towards the inmates, comparing them to the unsuccessful policies of a previous administration."[19] Jackson further predicted that another disturbance at MCC would occur within six months if Bair's policies were continued.[20] Williams claimed that Jackson also stated that "when the disturbance occurred, he was going to sit back and watch it happen."[21]

Williams reported her version of the discussion to Bair that day.[22] When confronted, Jackson admitted to having generally criticized Bair's policies, but denied saying that he would sit back and allow a riot to occur.[23] Jackson also asserted "that he was a loyal employee and was not attempting to cause trouble, but rather was simply talking privately to some co-workers."[24]

Bair reassigned Jackson to the Virginia State Penitentiary.[25] Jackson protested the transfer and refused to report, "claiming that his life would be in danger" in the newly assigned facility.[26] Before a grievance panel could meet to consider his protest, Bair terminated Jackson, "allegedly as a result of his refusal to report to his new post."[27] The grievance panel returned Jackson to MCC but did not reinstate him to the PERT.[28] Jackson brought his action against Bair and other prison officials claiming first amendment and procedural due process violations.[29]

The district court granted defendants' motion for summary judgment, concluding that defendant Sielaff "had no direct part in any of the challenged ac-

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15. *Id.* (Widener, J., dissenting).

16. *Id.* (Widener, J., dissenting).

17. *Id.* at 715. Prison regulations barred inmates from the staff dining area during meals, but they were "permissibly present in the adjoining kitchen and tray collection areas." *Id.* at 716. At least one witness testified that Jackson's voice was loud enough for others to overhear in the dining room. *Id.*

18. *Id.* at 715-16.

19. *Id.* at 716.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. Bair suspended Jackson pending an investigation and ordered Jackson escorted from the prison. *Id.* at 716, 723. Several hours later Jackson returned to pick up some personal items, and Bair gave him a letter which rescinded the suspension and transferred Jackson to a different prison facility. *Id.* at 716. Another letter, changing his transfer to yet another facility, was delivered to Jackson's residence later that day.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 716-17. Jackson named as codefendants other officials to whom he appealed the transfer.

tions,"[30] and denying Jackson's first amendment and due process claims on their merits as to the other defendants.[31] The district court's unpublished decision applied the test the Supreme Court established in *Pickering v. Board of Education*[32] to determine if Jackson's speech was of public concern, and if so, whether his interest in free expression was outweighed by his employer's interest in "promoting the efficiency of the public services it performs through its employees."[33] Specifically, the court recognized a "great need for harmony in the workplace" in a maximum security prison environment.[34] Such a work environment required that guards have a "close and trusting relationship with their co-workers."[35] Given these requirements, Jackson's speech "could possibly damage a fellow prison guard's faith" in both Jackson and the prison system.[36] Jackson's criticism of Bair's policies had the "potential, clear and present, to impede the employee's ability to perform his duties."[37] The court saw in the statements a "problem-causing potential."[38] It cited morale problems, the possibility of increased tension between inmates and guards, and the possibility of eavesdropping in the dining room leading to the self-fulfilling prophecy of a disturbance.[39] Accordingly, the court held that "even if Jackson's comments concerned matters of public interest in a limited way," the State's interest in maintaining harmony outweighed Jackson's first amendment interest in the speech.[40] Jackson appealed to the United States Court of Appeals for the Fourth Circuit, challenging only the judgment against his first amendment claim.[41]

The Fourth Circuit first reviewed the background of the public employee speech doctrine and, in so doing, catalogued the difficulties that courts face when confronting this issue.[42] The balancing test requires "great subleties [sic] of judgment," as the relative interests will vary widely in different factual situations.[43] The court also stated that the "hybrid law/fact nature of the constitutional right at issue" added to its complexity.[44]

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30. *Id.* at 717. Sielaff was one of the prison administrators who heard Jackson's complaints the day after the transfer. At that time, Sielaff advised Jackson to report to the Virginia State Penitentiary and, despite Jackson's fears for his life, "try the new assignment." *Id.* at 716.

31. *Id.* at 719 n.3. The majority in *Jackson* excerpted the district court's discussion of the first amendment claim in this footnote.

32. 391 U.S. 563 (1968). The two-part *Pickering* analysis consists of a "public concern" prong and a "particularized balancing" prong. For a discussion of *Pickering*, see *infra* text accompanying notes 70-80.

33. *Jackson*, 851 F.2d at 719 n.3. *Pickering* was the only case mentioned in the district court's discussion of Jackson's first amendment claim. *See id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 717.

42. *Id.* at 717-19.

43. *Id.* at 717.

44. *Id.* at 718. Interest balancing requires a close scrutiny of the particular circumstances, and will "inevitably embrace subsidiary issues of pure historical fact which establish the context in which 'public concern' and the appropriate balance of competing interests must be legally assessed in par-

The court of appeals held that the district court erred in its threshold assessment of Jackson's speech when it concluded that the speech was of only limited public concern only.[45] Because the Fourth Circuit found that the district court's public concern analysis was erroneous, it held that the lower court's particularized balancing analysis was "tainted from the outset."[46] According to the court of appeals, the summary judgment record contained "disputed [and] underdeveloped" facts concerning the "extent of the actual threat posed by Jackson's speech to legitimate public employer interests."[47] Hence the district court could not have properly balanced the competing interests, irrespective of the weight it chose to assign to Jackson's speech.[48] The Fourth Circuit vacated the summary judgment and remanded for trial on the "unresolved issues of causation"[49] and "whether on balance Jackson's speech is protected."[50]

The majority considered the district court's findings that Jackson's speech created possibilites of morale problems, employee tensions, and conflicts with inmates, and determined that such findings lacked support in the factual record.[51] The Fourth Circuit concluded that, instead of resting on hard facts,[52] Bair's decision to fire Jackson relied on conflicting versions of the "actual or threatened impact of Jackson's speech."[53] Thus, though the Fourth Circuit endorsed the district court's conclusions that "employment in the prison context presents special considerations favoring the public employer in the balancing process,"[54] and that a public employer "need not await actual disruption before acting to discipline,"[55] it required that the employer whose disciplinary action is

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ticular cases." *Id.* Despite the centrality of factual analysis, ultimately both the public concern and interest balancing aspects of the test are questions of law, not of fact. *See* Connick v. Myers, 461 U.S. 138, 148 & n.7, 150 n.10 (1983). For a discussion of *Connick*, see *infra* notes 81-101 and accompanying text.

45. *Jackson*, 851 F.2d at 720. The Fourth Circuit's analysis of the public concern prong rested on its conclusion that state prison security and the policies aimed at fostering that security are "obviously matters of fundamental and rightful public concern." *Id.* The Fourth Circuit, therefore, held that the district court's conclusion that Jackson's speech concerned a matter of only limited public concern was "legally erroneous." *Id.*

46. *Id.* at 721.

47. *Id.*

48. *Id.*

49. For a discussion of the causation analysis in the context of public employee speech doctrine, see Mt. Healthy City School Board v. Doyle, 429 U.S. 274, 287 (1977) (plaintiff has burden of showing that "his conduct was constitutionally protected, and that this conduct was a 'substantial factor' " in the employment action; when plaintiff meets that burden, employer then has burden of showing that "it would have reached the same decision . . . even in the absence of the protected conduct").

50. *Jackson*, 851 F.2d at 722.

51. *Id.* at 721. "All of these possibilities and potentialities and hypotheses" might have tipped the particularized balancing towards the employer's interest if there were facts supporting a determination that "such a threat to employer interests actually existed, or even if it could reasonably have been apprehended by Bair and his superiors whether or not it actually existed." *Id.*

52. *Id.*

53. *Id.* at 722. The "immediate perceptions and reactions" of Jackson's audience "bore critically upon the likelihood that any real threat existed," and hence were "critical to a fair assessment of the balancing issue." *Id.* Depending on the "context" of the speech, Jackson's comments may have been received by his audience as "nothing more than the routine grousing that occurs in varying degrees in any workplace." *Id.*

54. *Id.*

55. *Id.*

based on "mere potential for disruption" must act with an "objectively justifiable basis for his apprehension of the threat."[56] The court stated that, because the witnesses' reports about the speech were conflicting, granting summary judgment in favor of the warden would require the court to adopt a rule treating Jackson's statements as "*per se* unprotected in the prison security environment, without regard to their actual potential for injury to employer interests."[57] A majority of the court of appeals "decline[d] to adopt such a rule."[58]

Judge Widener's dissenting opinion argued that the record did support summary judgment in favor of the Virginia Department of Corrections.[59] The dissent argued that the majority opinion "ignore[d] the background of riot and turmoil and improperly minimize[d] much of the factual setting."[60] The dissent described in greater detail the recent turmoil between inmates, the administrative upheaval preceding Bair's appointment as warden, and Jackson's recent argument with Bair.[61] Judge Widener concluded that "as a matter of law based upon the application of the undisputed facts in this record, there existed the threat of disruption or harm entitling the public employer to suspend and then transfer Jackson."[62] Jackson, as supervisor of a paramilitary unit, was required to show great loyalty.[63] In this context, the court owed deference to the employer's decision, especially in light of the "common-sense [policy] that government offices could not function if every employment decision became a constitutional matter."[64]

The dissent further castigated the majority for requiring an " 'objectively justifiable basis for [the] apprehension of a threat,' "[65] from which the dissent inferred that the "department had a duty to gather evidence which tended to show probable disruption or harm before it acted."[66] Judge Widener distinguished the standard of "[w]hether or not a public employer is justified in perceiving a threat" from the much different standard of whether the employer had proven "the existence of an *objectively justifiable* basis for such a perception."[67]

The United States Supreme Court has handed down several important decisions addressing the free speech rights of a public employee. The Court's deci-

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 724 (Widener, J., dissenting).

60. *Id.* at 725 (Widener, J., dissenting).

61. *Id.* at 722-23 (Widener, J., dissenting).

62. *Id.* at 727 (Widener, J., dissenting).

63. *Id.* at 726 (Widener, J., dissenting); *see* Joyner v. Lancaster, 815 F.2d 20, 24 (4th Cir.) (where plaintiff was a captain in the sheriff's office who implemented sheriff's policies, "mutual confidence and loyalty are of great importance"), *cert. denied*, 108 S. Ct. 102 (1987). For a discussion of *Joyner*, see *infra* notes 104-13 and accompanying text.

64. Connick v. Myers, 461 U.S. 138, 143 (1983), *cited with approval in Jackson*, 851 F.2d at 726 (Widener, J., dissenting). For a discussion of *Connick*, see *infra* notes 81-101 and accompanying text.

65. *Jackson*, 851 F.2d at 726 (Widener, J., dissenting) (quoting majority opinion, *id.* at 722).

66. *Id.* at 727 (Widener, J., dissenting).

67. *Id.* (Widener, J., dissenting).

sions in *Pickering v. Board of Education*[68] and *Connick v. Myers*[69] are particularly significant.

In *Pickering*, plaintiff was a high school teacher who sent a letter to a local newspaper criticizing the school board's handling of recent tax increases.[70] Plaintiff was dismissed from his employment after the school board found that publication of the letter was " 'detrimental to the efficient operation and administration of the schools of the district.' "[71] The Circuit Court of Will County affirmed the dismissal, as did the Illinois Supreme Court.[72]

In reversing the state supreme court decision,[73] the United States Supreme Court stated in its public concern analysis that how the school system raises and spends revenue is the type of issue about which "free and open debate is vital to informed decision-making by the electorate."[74] Teachers are likely to have informed opinions on such an issue. Hence, "it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal."[75] In its particularized balancing analysis, the Court found that defendant had failed to show that the critical comments, some of which were erroneous, had or could be presumed to have "in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally."[76] Accordingly, the interest of the school in "limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public."[77]

The *Pickering* decision's enduring significance lies in its careful and yet sweeping statement of the judiciary's recognition of the essential trade-off involved in public employee speech doctrine cases: "The problem . . . is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[78] The Court recognized the incalculable number and variety of fact situations in which this particular legal quandry finds expression and held it was neither "appropriate [nor] feasible to attempt to lay down a general standard against which all such statements may be judged."[79]

The *Pickering* Court's analysis of plaintiff's speech and the ramifications of that speech in the particular context of the school district suggested a number of

68. 391 U.S. 563 (1968).
69. 461 U.S. 138 (1983).
70. 391 U.S. at 564-65.
71. *Id.* at 564 (quoting determination of Board of Education of Township High School District 205, Will County).
72. Pickering v. Board of Educ., 36 Ill. 2d 568, 225 N.E.2d 1 (1967), *rev'd*, 391 U.S. 563 (1968).
73. *Pickering*, 391 U.S. at 565.
74. *Id.* at 571-72.
75. *Id.* at 572.
76. *Id.* at 572-73 (footnote omitted).
77. *Id.* at 573.
78. *Id.* at 568.
79. *Id.* at 569.

factors which have become standard considerations in the particularized balancing test. These factors include: (1) whether the employee's statements are directed toward one with whom the employee would normally be in contact during work; (2) whether the speech imperils the discipline or harmony of coworkers; and (3) whether the working relationships are so close as to require personal loyalty and confidence in order to function properly.[80]

In *Connick v. Myers*[81] the Court addressed standards to be used in the particularized balancing test. Plaintiff, an Assistant District Attorney, was unhappy with a decision to transfer her to a different section of the criminal court.[82] Plaintiff wrote and distributed among coworkers a questionnaire soliciting opinions about "office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns."[83] Plaintiff filed suit against District Attorney Connick of Orleans Parish alleging that the decision to terminate her employment was based on the exercise of her constitutionally protected right of free speech.[84] In a 5-4 decision finding no constitutional violation,[85] the Court first addressed the public concern prong of the public employee speech doctrine analysis. It announced a standard for use in assessing the public concern element of the public employee speech doctrine. The Court made explicit that "[w]hether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record."[86] Applying this to the questionnaire, the Court found the questionnaire to be motivated "not to evaluate the performance of the office," but rather to provide plaintiff with "ammunition for another round of controversy" with management.[87] Only one query in the questionnaire was held to be of any public concern: the request for information concerning whether employees had been pressured to work in political campaigns.[88] In spite of this one question, the Court found the questionnaire in its entirety was "of public concern in only a most limited sense," because it was "most accurately characterized as an employee grievance concerning internal office policy."[89]

Having found a question of some public interest, the Court was obligated to

80. *Id.* at 569-70.

81. 461 U.S. 138 (1983) (5-4 decision).

82. *Id.* at 140. Plaintiff was concerned that a conflict of interest would arise because she participated in a probation counselling program in the section of the criminal court to which she was reassigned. *Id.* at 140 n.1.

83. *Id.* at 141. The District Court had held that the questionnaire involved matters of public concern and that the State had not shown that distribution of the survey "adversely affected or substantially impeded" the District Attorney's interest in promoting the efficiency of his office. Myers v. Connick, 507 F. Supp. 752, 759 (E.D. La.), *aff'd*, 654 F.2d 719 (5th Cir. 1981), *aff'd*, 461 U.S. 138 (1982).

84. *Connick*, 461 U.S. at 141.

85. *Id.* (White, J., writing for the majority consisting of Burger, C.J., Powell, Rehnquist, and O'Connor, JJ.; Brennan, J., dissenting and joined by Marshall, Blackmun, and Stevens, JJ.).

86. *Id.* at 147-48.

87. *Id.* at 148.

88. *Id.* at 149. There is a "demonstrated interest . . . that government service should depend upon meritorious performance rather than political service."

89. *Id.* at 154.

undertake a full particularized balancing analysis. As a prelude to its analysis, the Court stated that the state's burden of proof in justifying an employment action will vary depending on the "nature of the employee's expression."[90] Myers' speech concerned an office policy in the context of an office dispute in which the speaker herself was embroiled.[91] In such a circumstance, "additional weight must be given to the supervisor's view that the employee has threatened the authority of the employer to run the office."[92]

The *Connick* Court addressed how the balancing test should treat potential disruption, rather than what constitutes evidence of actual disruption.[93] The Court did not dispute the district court's finding that defendant had failed to demonstrate that the questionnaire "impeded Myers' ability to perform her responsibilities."[94] The opinion revealed no evidence that suggested potential disruption, other than testimony by Myers' supervisor and the District Attorney that distribution of the questionnaire had disruptive potential.[95] Myers, in the words of the District Attorney, " 'was affirmatively opposing [her transfer] and [was] disrupting the routine of the office by this questionnaire.' "[96] The supervisors' testimony on the potential for disruption consisted of their personal "judgment[s]."[97]

Significantly, despite the seeming dearth of evidence of potential disruption, the Court held that there is no "necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action."[98] The Court's stance on potential disruption was clear: "When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate."[99] Applying this to the facts of *Connick*, the Court held that Myers' discharge did not offend the Constitution; the "limited" public interest in Myers' right to speak did not require the employer to "tolerate actions which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships."[100]

The significance of the *Connick* decision is threefold. First, it applies the *Pickering* analysis in such a way as to distinguish carefully between speech that is of public concern and speech that concerns private, personnel related matters. Second, it firmly allows employers acting on the basis of potential disruption

90. *Id.* at 150.
91. *Id.* at 153.
92. *Id.*
93. *Id.* at 152.
94. *Id.* at 151.
95. *Id.* n.11 (quoting Record at 130, *Connick* (No. 81-1251)).
96. *Id.* (quoting Record at 130, *Connick* (No. 81-1251)). The District Attorney's first assistant characterized Myers' act as a " 'mini-insurrection' " and an attempt to " 'stir up other people not to accept the changes' " being implemented. *Id.* at 151 & n.11 (quoting Record at 167, *Connick* (No. 81-1251)).
97. *Id.*
98. *Id.* at 152.
99. *Id.* at 151-52. The Court did note that the greater the public importance of the employee's speech, the stronger the requisite showing of potential disruption. *Id.* at 152 n.12.
100. *Id.* at 154.

that is reasonably forecasted. Third, it builds into the particularized balancing analysis a weighing of the employment's form and context, so that wide deference is granted to employers who maintain close working relationships with employees.[101] Viewed together, these three aspects of the *Connick* decision require courts to consider fully the employers' interests and refrain from usurping employers' personnel powers.

The Fourth Circuit has decided a number of cases that examine employment contexts similar to the prison environment of *Jackson*, and that adhere to *Connick*'s edict to consider the content, form, and context[102] of the statement as revealed by the entire record.[103] These cases focus on the unique concerns of management in jails, prisons, and on police forces. These cases treat such paramilitary employment as deserving special deference in light of the strong need for loyalty and discipline in such employment.

In *Joyner v. Lancaster*[104] plaintiff was the senior captain in the Forsyth County, North Carolina Sheriff's Department. As a "highly placed official in a para-military unit," he implemented sheriff's policies and served as an "essential link between the sheriff and the deputies whom he supervised."[105] During an election period, plaintiff vigorously campaigned against the sheriff and supported the challenger, a personal friend.[106] After the sheriff was reelected, plaintiff was terminated.[107] Plaintiff brought an action against the county and the sheriff.[108]

The court found that actual disruption arose from plaintiff's campaign activities: close to thirty employees complained of "pervasive distrust and plummeting morale" as a result of plaintiff's political work.[109] Hence, unlike *Jackson*, the reasonableness of the forecast of disruption was not an issue. *Joyner*'s significance to the paramilitary employment line of cases stems from its characterization of plaintiff's duties as requiring "mutual confidence and loyalty."[110] This finding influenced the particularized balancing analysis: plaintiff's interest in exercising his first amendment rights yielded to the "sheriff's interest in the effective and efficient fulfillment of his department's responsibili-

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101. *Id.* at 151-52.

102. *Connick*, 461 U.S. at 147-48.

103. *See, e.g.*, Joyner v. Lancaster, 815 F.2d 20 (4th Cir.), *cert. denied*, 108 S. Ct. 102 (1987); Wilton v. Mayor of Baltimore, 772 F.2d 88 (4th Cir. 1985); Jurgensen v. Fairfax County, 745 F.2d 868 (4th Cir. 1984). For a discussion of *Joyner*, see *infra* notes 104-113 and accompanying text. For a discussion of *Wilton*, see *infra* text accompanying notes 127-34. For a discussion of *Jurgensen*, see *infra* notes 114-26 and accompanying text.

104. 815 F.2d 20 (4th Cir.), *cert. denied*, 108 S. Ct. 102 (1987).

105. *Id.* at 24.

106. *Id.* at 21-22.

107. *Id.* at 22.

108. *Id.*

109. *Id.* The court found:

> There would have been no disruption in this case had not a highly placed insider engaged in partisan political activity that seemingly enhanced the threat to the job security of the other employees. . . . Sheriff Lancaster not unreasonably concluded that [the problems] were correctable only by removing Joyner from the department.

*Id.* at 24.

110. *Id.*

ties."[111] Plaintiff's position in the department, coupled with his political activities, "created more than a potential for disruption; they actually created that disruption which would have sufficed for his discharge if it had only reasonably been apprehended."[112] The *Joyner* decision is, therefore, authority for conducting the particularized balancing analysis with full weight given to the special "content, form, and context"[113] of paramilitary employment.

In *Jurgensen v. Fairfax County*[114] plaintiff was an Assistant Squad Supervisor in the Fairfax County, Virginia Police Department.[115] Plaintiff clandestinely secured a copy of an internal inspection report that discussed departmental problems, and gave the report to a newspaper reporter.[116] During a department inquiry into the news leak, plaintiff admitted his involvement.[117] The following day, plaintiff visited the Chief of Police and accepted a "voluntary demotion," rather than risk an outright discharge through normal Civil Service employment process.[118] Several days after the written agreement between plaintiff and the Police Chief, plaintiff sought to rescind the demotion, claiming he had been under duress.[119] When this request was denied, plaintiff sued the Police Department claiming a violation of his first amendment rights and seeking damages and reinstatement.[120]

The court held that plaintiff's claim failed for lack of proof of causation[121] and concluded that plaintiff's violation of a departmental regulation concerning the unauthorized release of departmental reports to the news media justified his demotion.[122] While superfluous to its decision, the court nonetheless conducted a *Pickering-Connick* analysis.[123] The report's contents were of no substantial public concern, and were characterized as " 'internal office policy' " matters,[124] of the sort deserving of deference to agency judgment.[125]

The Fourth Circuit, in conducting the particularized balancing test, held that the special character of para-military organizations such as the police is to be accorded its full, albeit inconclusive, weight: "While manifestly, under such a rule, the free speech rights of an employee in a police department are more lim-

111. *Id.*

112. *Id.*

113. *Connick*, 461 U.S. at 147-48.

114. 745 F.2d 868 (4th Cir. 1984). For a brief discussion of *Jurgensen*, see Note, *The Fourth Circuit Review: Determining the Free Speech Rights of Public Employees*, 43 WASH. & LEE L. REV. 616 (1986).

115. *Jurgensen*, 745 F.2d at 870-71.

116. *Id.* at 874-75.

117. *Id.* at 876.

118. *Id.* at 876-77 (The accounts of Jurgensen and the Chief of Police differ as to who first suggested the demotion.).

119. *Id.* at 877.

120. *Id.*

121. *Id.* at 887. Plaintiff did not prove that his speech was the motivating cause of his dismissal.

122. *Id.* at 883.

123. *Id.* at 888.

124. *Id.* (quoting Connick v. Myers, 461 U.S. 138, 147-48 (1968)). The internal inspection report identified no abuse of authority or of corruption, but made various recommendations, such as increased staffing, changes in training practices, and equipment upgrades. *Id.* at 871-72.

125. *Id.* at 888.

ited than that of a teacher, this is not to say that such employees have no free speech rights."[126]

In *Wilton v. Mayor of Baltimore*[127] plaintiffs were correctional officers in the city jail. Plaintiffs' civil rights complaint alleged that they were denied promotion to supervisory positions because of their membership in the jail employees' union.[128] The Fourth Circuit Court of Appeals reversed a trial court judgment for plaintiffs.[129] Adopting the reasoning of a case in which fire fighters had been denied promotion,[130] the court of appeals held that a locality may validly prohibit supervisory personnel from being in the jail employees' union.[131] Freedom of association may be " 'validly limited where the limitation is necessary to a substantial and legitimate state interest.' "[132] The court held that this determination involves by analogy the same balancing considerations announced in *Connick*.[133] Again, the Fourth Circuit examined the employment context of a city jail and held that "[t]he efficient administration of jails is of paramount importance. . . . [J]ails generically are places where the government possesses a legitimate interest in 'the proper discipline in the public service,' " and where the State " 'must have wide discretion and control over the management of its personnel and internal affairs.' "[134]

*Jackson*'s place in this "paramilitary" line of Fourth Circuit cases is somewhat anomalous. While the *Jackson* majority briefly noted the special considerations of the prison employment setting,[135] the court would not, on the strength of the summary judgment record, balance in favor of the employer absent more evidence that objectively supported the employer's judgment about potential disruption.[136] Hence the *Jackson* court shied away from any appearance of creating a per se rule about employee speech in a work environment covered by the "paramilitary" context case authority.[137]

At first glance, the *Jackson* decision may not seem tremendously significant. After all, arguably, *Jackson* simply shows how reluctant courts are to grant summary judgment on constitutional claims.[138] *Connick* established that in public

126. *Id.* at 880.
127. 772 F.2d 88 (4th Cir. 1985).
128. *Id.* at 89.
129. *Id.*
130. York County Fire Fighters Ass'n, Local 2498 v. County of York, 589 F.2d 775 (4th Cir. 1978).
131. *Wilton*, 772 F.2d at 91.
132. *Id.* (quoting *York County Fire Fighters*, 589 F.2d at 778).
133. *Id.* at 91.
134. *Id.* (quoting *Connick*, 461 U.S. at 151).
135. Jackson v. Bair, 851 F.2d 714, 722 (4th Cir. 1988).
136. *Id.*
137. *Id.*
138. *See, e.g.*, Porter v. Califano, 592 F.2d 770, 778 (5th Cir. 1979) (pre-*Connick*).

> As a general rule a court should use Rule 56 summary judgment most sparingly in a First Amendment case such as this involving delicate constitutional rights, complex fact situations, disputed testimony, and questionable credibilities. . . . Courts must not allow Rule 56 and the interests of judicial economy to become a rubber stamp obscuring rights indelibly printed in the constitution.

*Id.*

employee speech cases, however, juries are not to decide whether the speech is public or private, or whether the employer's interest in efficiency and discipline balances favorably against the employee's interest in the speech.[139] Thus, courts contemplating the grant of summary judgment need not fear that they are depriving a jury of its opportunity to perform its function. *Jackson* is significant because its facts supported summary judgment in favor of the employer. By reversing the summary judgment, the Fourth Circuit sent a strong message that its application of the public concern prong and the particularized balancing analysis was changing from its earlier cases and adding to *Connick*'s requirements, particularly with regard to balancing the burden of proof.

The Fourth Circuit's reversal technically rests on its finding that the district court erred as a matter of law in holding that Jackson's speech was of public concern only in a limited way.[140] After inferring possible bases for the district court's view that the speech was of only limited public concern, the court rebutted those bases.[141] It then concluded that Jackson's speech obviously and directly concerned matters of grave fundamental and rightful public concern.[142] To reach this conclusion, the court asserted, without explicit case authority, that "content, [or] subject-matter, is always the central aspect" of the threshold test, while "[f]orm and context *may* of course *in some cases* give special color to speech."[143]

By refashioning the rule to state that "content . . . is always the central aspect"[144] of the threshold test of public concern, the court overlooks both the form and context of employee speech. It therefore gave little or no effect to the off-the-cuff nature of Jackson's remarks, the audience he addressed, and the reaction of that audience. The effect of this change in emphasis, however, ignores the edicts of *Connick* and more narrowly, the facts of *Jackson*. As a consequence, the court too easily discredits the reasonable, rational basis of the district court's finding that the speech was only of limited public concern. Though Jackson's comment about the Warden's alleged leniency may have derived from a general concern about the corrections process, it may also have been rooted in a concern for his own personal safety, or in the dispute with Bair that preceded the incident by several weeks.[145] Were this the case, a court could have found

139. *See, e.g.*, Joyner v. Lancaster, 815 F.2d 20, 23 (4th Cir. 1987), *cert. denied*, 108 S. Ct. 102 (1987).

> Joyner contends that it is the province of a jury or fact finder to determine the underlying facts to which the court then applies the legal standard. The clear implication of *Connick*, however, is to the contrary . . . . The district court properly concluded that the question presented is one of constitutional law for the court. . . . [T]he entire matter was one for determination by the court.

*Id.*

140. *Jackson*, 851 F.2d at 720.

141. *Id.* at 720-21.

142. *Id.*

143. *Id.* at 720 (emphasis added).

144. *Id.*

145. *Id.* at 716; *see, e.g.*, Daniels v. Quinn, 801 F.2d 687, 690 (4th Cir. 1986) (teacher's assistant went "over the head" of principal to complain to school board member about late arrival of requisitioned books; court held that "[t]o accord to all such grievances the status of protected speech is to invite a measure of educational involvement that federal tribunals are ill equipped to undertake");

that the personal concerns in Jackson's speech were "so intermixed with the public matters, that the public parts of the communications cannot be treated as if they stood alone."[146] Such a finding would gain support from *Connick*'s holding that government employment is not meant to be conducted as a perpetual "roundtable for employee complaints over internal office affairs."[147] Some members of Jackson's audience indicated that his speech "made no particular impression upon them,"[148] thus supporting an inference that Jackson's comments, far from concerning matters of public concern, constituted "nothing more than the routine grousing that occurs in varying degrees in any workplace."[149] Certainly their discounting the speech affects the gravity of the employment action,[150] but it also permits a different result in the public or private concern test.

In addition to the form and context of the speech in *Jackson* that point to a conclusion of private concern, a strong policy militates against adopting a standard that too heavily leans toward finding the speech to be public. As the Court in *Connick* said, "[t]o presume that all matters which transpire within a government office are of public concern would mean that virtually every remark—and certainly every criticism directed at a public official—would plant the seed of a constitutional case."[151] *Jackson*'s significance in terms of the public concern prong rests in the court's downplaying of context and form, and in the guidance it gives to future courts by concluding that the speech was obviously of public concern and not related to private, personnel-oriented concerns.

*Jackson* is also significant in terms of its guidance on the particularized balancing prong of the public employee speech doctrine. The factual record provided a compelling opportunity to grant summary judgment for the employer on this second prong, yet the court reversed the district court's summary judgment decision and remanded. Before *Jackson*, both Supreme Court and Fourth Circuit decisions emphasized the special considerations of the prison employment setting. The court in *Jackson* did note the special considerations of the prison

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Smith v. Wythe-Grayson Regional Library Bd., 657 F. Supp. 1216 (W.D. Va. 1987) (seventeen enumerated grounds for demotion of library assistant were unrelated to any matter of public concern except for plaintiff's antagonism "toward efforts to obtain United Way funds" for the library, and even this was of only tangential interest to the public).

146. *See* Fiorillo v. Bureau of Prisons, 795 F.2d 1544, 1546, 1551 (Fed. Cir. 1986) (Davis, J., concurring). In *Fiorillo*, plaintiff's suspension and demotion was based on allegations that he had violated regulations governing Federal Prison System employees by making statements to the news media that the Warden determined to have "reflect[ed] negatively on this institution and damage[d] the public's confidence in our ability to carry out our mission." *Id.* The court held that the "agency was not unreasonably concerned that petitioner's statements would have adversely affected the discipline and morale at Terminal Island," and that "petitioner's suspension and demotion would promote the efficiency of the service." *Id.*

147. *Connick*, 461 U.S. at 149.

148. *Jackson*, 851 F.2d at 722.

149. *Id.*

150. *See* Brown v. Department of Transp., 735 F.2d 543 (Fed. Cir. 1984) (Plaintiff, supervisor of air traffic controllers, made pro-strike statements, and, while discipline was justified, the court remanded for mitigation of penalty because it was unreasonable to dismiss plaintiff under the circumstances.).

151. *Connick*, 461 U.S. at 149.

employment setting.[152] In *Jurgensen*, the Fourth Circuit described a spectrum upon which nonpolicymaking public employees can be arranged, with courts giving "weight to the nature of the employee's job in assessing the possible effect of his action on employee morale, discipline or efficiency."[153] University professors occupied one end of the spectrum, as "[s]tate inhibition of academic freedom is strongly disfavored. . . . In polar contrast is the discipline demanded of, and freedom correspondingly denied to, policemen."[154] Prison officials should be due a measure of deference in their employment decisions, since prison guards, closely akin to policemen, do not have the same broad mandate to speak freely as do public school teachers. Prisons arguably have the same interest as police departments,[155] jails,[156] and sheriff's departments[157] in promoting efficiency and integrity in their workplace, and in requiring that the conduct of guards not hinder mutual confidence and loyalty. Indeed, prisons' maximum security status arguably gives wardens an even stronger claim for deference to their employment decisions. The *Jackson* court, however, downplayed the importance of the paramilitary context of the speech.

In addition, *Jackson* essentially ignored *Connick*'s evidentiary standards for finding disruptiveness in speech. In *Connick* the Court upheld District Attorney Connick's employment action against Myers, even though Connick acted on the basis of hearsay reports from supervisors without evidence of actual disruption.[158] The court specifically acknowledged the role judgment plays in this dismissal. Connick acted based on his "judgment, and apparently also that of his first assistant," that Myers' actions "interfered with working relationships."[159] The *Connick* Court made no further evidentiary demands; indeed, the Court explicitly held that "[w]hen close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's *judgment* is appropriate."[160] The *Connick* court recognized judicial deference to a supervisor's reasonable judgment that employee speech created an actual threat of, or potential for, disruption. In the Fourth Circuit after *Jackson*, such reasonable judgment will not suffice.

The district court and the dissent in the court of appeals more faithfully applied the *Connick* standards and guidelines. The dissent argued that the record established the "actual existence of the potential for another serious disturbance," and stressed that, beyond MCC's functional status as a maximum

152. *Jackson*, 851 F.2d at 722.

153. 745 F.2d at 880.

154. *Id.* (citations omitted).

155. *Id.*

156. *Wilton*, 772 F.2d at 91. For a discussion of *Wilton*, see *supra* text accompanying notes 127-34.

157. *Joyner*, 815 F.2d at 24. For a discussion of *Joyner*, see *supra* text accompanying notes 104-13.

158. 461 U.S. at 151-52.

159. *Id.* at 151. Unlike *Jackson*, the reports of the supervisors in *Connick* were substantially without conflict. There was no conflict in *Jackson*, however, concerning the fact that Jackson, in the presence of his fellow guards, criticized the warden for leniency and predicted a resulting disturbance.

160. *Id.* at 151-52 (emphasis added).

security institution, it was a most troubled one, "capable of exploding at any misstep."[161] Further, Jackson was not simply a prison guard; indeed, he was more than just a member of PERT. He was the team's commander, ready to respond in emergency situations and serving as a vital link in the chain of command that began with the warden.[162] The district court found that Jackson's speech "had the potential, clear and present, to impede" Jackson's ability to perform his duties, and hence "endangered the total mission" of MCC.[163]

Under *Connick*, the facts in *Jackson* arguably favor the employer's position. The *Jackson* majority, however, converts the district court's specific findings of various possibilities into contingencies too remote to be relied upon reasonably.[164] By adopting a test requiring an "objectively justifiable basis" for believing that employee speech will disrupt operations or morale, the *Jackson* court went beyond what the *Connick* Court required, and adopted a standard contrary to *Connick*'s view that courts should not impose an unduly onerous burden on an employer seeking to justify a discharge.[165]

The majority opinion noted that Warden Bair "acted on no more information about the actual or threatened impact of Jackson's speech than the conflicting versions" supplied by Jackson and Martha Williams.[166] Implicit in the majority's objectively justifiable standard is the notion that there does not inhere in a government supervisor's position—whether she's a school principal or Secretary of Defense or warden of a Virginia prison—enough authority or judgment to make her own assessment of the potential or actual harm caused by a statement if she has received conflicting reports about the speech. The *Jackson* court in effect held that, simply because the reports conflicted, the warden did not have sufficient facts upon which to base a decision to discipline Jackson. The warden's experience with prisons, prisoners, and supervision of guards did not constitute or, seemingly, even contribute to an "objectively justifiable basis" for apprehension of harm.

Government supervisors will not always be able to arm themselves with a set of facts that point inexorably toward only one possible disciplinary decision. Ambiguity is inevitable, and where there is ambiguity, judgment, tempered by procedure, must fill the breach. Requiring a disciplinary decision to come fully equipped with an objectively justifiable basis for apprehension of potential disruption adds to the decisionmaking process a layer of required investigation, documentation, and certainty which may not, under many circumstances, be practical or even possible. The Fourth Circuit has legislated that in such circumstances, it is now constitutionally improper to defer to the judgment of su-

161. *Jackson*, 851 F.2d at 725 n.3 (Widener, J., dissenting).

162. Jackson's employment role is highly relevant to the balancing inquiry. *See, e.g.*, Rankin v. McPherson, 107 S. Ct. 2891 (1988) (plaintiff's duties in constable's office were "purely clerical" and did not impact on the "minimal law enforcement activity" of the office, hence her interest in speech outweighed that of employer).

163. *Jackson*, 851 F.2d at 719 n.3.

164. *Id.*

165. *Connick*, 461 U.S. at 149.

166. *Jackson*, 851 F.2d at 722.

pervisory personnel whose judgment presumably is one of their primary qualifications for their positions.

The dissent maintained that the record established the potential for disruption,[167] and met *Connick*'s requirement that an employer may act reasonably on the basis of potential disruption.[168] The dissent read the objectively justifiable basis requirement, and its application to the facts of *Jackson*, as creating an unfortunate "duty to gather evidence which tended to show probable disruption or harm before it acted."[169] The dissent specifically cites the majority's discussion of the conflicting "actual perceptions and suggested reactions of coworkers."[170]

The Fourth Circuit in *Jackson* sends a message to the government employer, which states that to sustain its burden in the interest balancing test, it cannot rest on the generic characteristics of a particular type of employment such as paramilitary officers, or on the history of the speech's setting, such as the turmoil of MCC. The *Jackson* court declined to adopt a rule that treats speech in the prison context as per se unprotected.[171] In this regard *Jackson* is in line with *Connick*'s and *Pickering*'s admonition that it is neither appropriate nor feasible " 'to attempt to lay down a general standard against which all such statements may be judged.' "[172] The *Jackson* court's treatment of *Connick* and its deferential, pro-employer spin on the *Pickering* analysis, however, amounts to little more than a nudge here.

The *Jackson* court's adoption of the objectively justifiable basis requirement implicitly reduces the discretionary power of public employers to use their experience and judgment to make disciplinary employment decisions in borderline factual situations. This is true even when the particular setting—a prison or paramilitary context—has previously received judicial deference to employment decisions. The "hybrid law/fact" nature of the public employee speech doctrine analysis[173] permitted the *Jackson* court to maneuver deftly the precedential milestones. In these situations, appellate level courts can overrule the findings of lower courts because the issues, however factual in nature, are constitutional and hence questions of law. It is unfortunate but perhaps inevitable that judicial analysis, unrestrained by anything resembling traditional appellate-level deference to the discretion of finders of fact,[174] renders this area unsettled, contributing little clarity to what the *Jackson* court accurately described as a complex

167. *Id.* at 725 n.3 (Widener, J., dissenting).

168. *Connick*, 461 U.S. at 152.

169. *Jackson*, 851 F.2d at 727.

170. *Id.*

171. *Id.* at 722. *See, e.g.*, Pickering v. Board of Educ., 391 U.S. 563, 570-71 (1968) (board of education, lacking any evidence of actual harm resulting from the speech, "must . . . have decided, perhaps by analogy with the law of libel, that the statements were *per se* harmful to the operation of the schools"; the statements, however, cannot "reasonably be regarded as *per se* detrimental").

172. *Connick*, 461 U.S. at 154 (quoting *Pickering*, 391 U.S. at 569).

173. *Jackson*, 851 F.2d at 718. For a discussion of the hybrid fact-law nature of the analysis, see *supra* text accompanying note 49.

174. *See* FED. R. CIV. P. 52(a): "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

area requiring "great subtleties of judgment."[175] In at least the Fourth Circuit, after *Jackson*, supervisors of public employees will now be required to demonstrate, like judges, great subtleties of judgment, for federal courts, despite the Court's holding in *Connick*, will be regarded as an increasingly attractive forum "in which to review the wisdom of a personnel decision."[176]

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175. *Jackson*, 851 F.2d at 717.

176. *Connick*, 461 U.S. at 147. The Court held that

> [w]hen a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employees behavior.

*Id.*